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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of Sections of the)
Cable Television Consumer) MM Docket No. 92-266
Protection and Competition)
Act of 1992:)
Rate Regulation)
)
Leased Commercial Access) CS Docket No. 96-60

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REPLY COMMENTS OF LIFETIME TELEVISION

Lifetime Television ("Lifetime") hereby submits its reply to comments filed in connection with the Commission's Report and Order and Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced proceeding proposing new rules for implementing the commercial leased access provisions of the Communications Act.¹

Lifetime submits that the record overwhelmingly confirms that: (i) there is no reason to alter fundamentally the formula for determining leased access rates to achieve the goal of promoting diversity of programming sources because consumers have access to a wide variety of diverse program services; and (ii) the changes to the leased access rules proposed by the Commission would result in the widespread deletion of existing program services. Lifetime therefore urges the Commission to reconsider its proposals

¹ In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation, Leased Commercial Access, MM Docket No. 92-266 and CS Docket No. 96-60, FCC 96-122 (rel. Mar. 29, 1996).

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and, to the extent any such changes are deemed necessary, to mitigate the harm to both programmers and consumers.

I. The Proposed Changes Will Cause Existing Program Services to be Bumped, to the Detriment of Programmers, Consumers and Cable Operators, Without Promoting the Goal of Enhancing Program Diversity

There is one point on which virtually all of the comments filed in this proceeding agree: Given the channel capacity constraints faced by cable operators today, adoption of the proposed rules would result in existing program services being bumped from cable systems to make room for leased access programmers.² The point of dispute between the opposing commenters is whether this certain result warrants Commission reconsideration of its proposal. Those supporting the changes proposed in the FNPRM (primarily low power television station operators and home shopping/infomercial based program services) urge the Commission not to consider this disruption to existing carriage at all. Lifetime and other programmers opposing the proposed changes believe that (i) it is vital for the Commission to consider the effect of such a profound change on the overall programming marketplace, particularly given the existing diversity of program services in the marketplace, and (ii) if any changes are deemed necessary at this time, the Commission should take steps to mitigate any harm to programmers, consumers and cable operators.

² See, e.g., Comments of Lifetime at 3-4; Comments of A&E Networks at 7-9; Comments of Center for Media Education, et al. at 30-31.

Lifetime and other programmers demonstrated in their initial comments the harms to programmers, consumers and cable operators that would result from such dislocation.³ Programmers would be harmed because they would be put in the unenviable position of either losing distribution -- and thus license fees and advertising revenue -- or retaining carriage via leased access, which would turn programmers' business plans upside down. Given the current economics underlying most programmers, either option would likely result in decreased investment in the production of quality programming.⁴ Cable subscribers would be harmed by losing the ability to continue viewing popular and valuable program services, and instead finding in their place the less desirable and poorer quality programming that will inevitably result.

Those supporting the Commission's proposed changes have not disputed these concerns. Rather, they merely argue that leased access capacity is not fully utilized because of the bad faith of cable operators and unreasonably high rates for leased access. They argue that, regardless of the impact on existing program services, the

³ See, e.g., Comments of Lifetime at 3-9; Comments of Turner Broadcasting Systems, Inc., et al., at 6-14; Comments of Viacom Inc. at 3-7; Comments of Outdoor Life Network, et al. at 10-28.

⁴ See Comments of Lifetime at 5. Indeed, economic studies submitted in the record indicate that the programmers most likely to benefit from the Commission's rules are those that do not rely on advertising revenue or cable operator license fees -- primarily home shopping and infomercial-based program services. Comments of Turner Broadcasting Systems, Inc., et al., at 9.

Commission should take whatever steps are necessary to promote the full usage of leased access capacity.⁵

Cable operators have and will continue to demonstrate that the proposed formula provides an unwarranted subsidy to leased access programmers. Lifetime and other commenters demonstrated that not every channel on a tier is of equal value to subscribers and that the proposed formula, combined with a guaranteed placement of leased access channels on a tier, effectively overstates the value of leased access programming. Thus, as Lifetime demonstrates in its comments, the Commission should not mandate the placement of leased access programming on the basic or expanded basic tier.⁶

Lifetime wishes here to emphasize that, as set forth in its initial comments, the entities most harmed by policies designed to increase leased access usage during a period of channel capacity constraints are existing program services -- particularly those unaffiliated with cable operators. Yet the very purpose of the leased access rules was to benefit unaffiliated programmers. It would be cruel irony indeed if a provision designed to aid programmers and diversity instead resulted in their demise.

This is particularly true given the evidence set forth in the record that the program marketplace is providing the diversity envisioned by Congress when enacting

⁵ See e.g., Comments of Center for Media Education at 30-31; Comments of The Game Show Network at 15-18; Comments of R.K. Production Company at 11.

⁶ Comments of Lifetime at 11.

the leased access provisions.⁷ Indeed, there is strong support for the proposition that, because of the current channel capacity constraints, the proposed changes will, at best, result in no increased diversity (as one non-affiliated program service is bumped to make room for another) and, at worst, result in decreased diversity (because of the economics favoring the use of leased access by home shopping and infomercial-based program services).

II. Given the Potential Harm to Programmers Supposed to Benefit From Leased Access, it is Imperative for the Commission to Take Steps to Provide Transition Relief to Any New Rules

To the extent the Commission nevertheless determines that changes to the existing rules are needed, Lifetime joins with other programmers in asking the Commission to minimize the harms that will result from increased leased access usage during a time of scarce channel capacity.⁸ Indeed, such a course is not only prudent, it is in full accord with the underlying goal of the leased access rules of enhancing diversity.

⁷ See, e.g., Comments of Lifetime at 9-10; Comments of Viacom at 7-9; Comments of Turner Broadcasting Systems, Inc., et al. at 4-6.

⁸ Lifetime notes that the comments of many cable operators demonstrate that the implementation of the formula proposed in the FNPRM would lead to absurdly low rates for leased access programmers -- a result never intended by Congress in implementing the program access provisions. Thus, to the extent the Commission determines that changes to the existing formula are warranted, Lifetime supports the proposal set forth by the NCTA in its comments, which would base leased access rates on the average revenues derived from all regulated channels, less average programming rates for all regulated channels, plus a reasonable mark-up. See Comments of NCTA at 21-24.

Accordingly, Lifetime urges the Commission to allow cable operators to retain any service being provided to subscribers on the effective date of any new leased access rate formula. This approach will mitigate disruption of existing services in a manner similar to that contemplated in the 1984 Act's original leased access rules. Leased access programmers would then be accommodated to the extent capacity is currently available and as additional capacity becomes available.

The Commission should also confirm that a cable operator's need to comply with any leased access requirement does not empower it to abrogate any existing programming contracts.⁹ Even the potential abrogation of existing contracts would create tremendous uncertainty in the programming marketplace, with a likely decrease in investment in programming resulting from an inability to make long-range plans and commitments.

If some displacement is to occur, Lifetime supports a lengthened transition period that will both allow programmers sufficient time to revise their business plans without needing to be concerned about their ability to honor existing programming and advertising commitments and allow cable operators additional time to increase capacity. Although Lifetime supports those commenters that would tie implementation of any new formula for calculating leased access rates to an increase in capacity, Lifetime

⁹ In this regard, Lifetime wishes to dispute the claims of ValueVision that cable operators have the ability to terminate existing programming agreements on 30 days notice. Comments of ValueVision at 22. Lifetime's agreements certainly do not allow cable operators to terminate its affiliation agreements essentially at will as purported by ValueVision.

urges the Commission, at a minimum, to allow cable operators to continue charging leased access programmers under the current formula for a period of five years.

III. The Commission Should Reject Any Calls to Preclude Existing Programmers From Obtaining Distribution Via Leased Access

Finally, Lifetime feels compelled to respond to the suggestions of the Center for Media Education that existing commercial programmers should be denied the ability to lease capacity.¹⁰ This suggestion should be rejected out of hand. Not only is such a course constitutionally infirm, but it would exacerbate the harm to existing programmers -- who may be displaced from carriage through no fault of their own -- by depriving them of their only remaining option of retaining distribution -- to lease capacity for themselves on the cable system.

IV. Conclusion

For the reasons set forth above, Lifetime urges the Commission to consider the likely harms to existing programmers that will result from the proposed changes to the leased access rules and to reconsider whether any changes to the rules are necessary to achieve the goal of promoting program diversity. To the extent the Commission finds

¹⁰ Comments of Center for Media Education, et al., at 15.

it necessary to make changes at this time, Lifetime urges the Commission to take the steps outlined above to mitigate the harms to programmers and consumers that will result.

Respectfully submitted,

LIFETIME TELEVISION

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